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### Is There Life After Concepcion? State Courts, State Law, and the Mandate of Arbitration

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**IS THERE LIFE AFTER *CONCEPCION*?  
STATE COURTS, STATE LAW, AND THE MANDATE OF  
ARBITRATION**

MICHAEL A. WOLFF\*

The Supreme Court's interpretation of the Federal Arbitration Act ("FAA")<sup>1</sup> in *AT&T Mobility LLC v. Concepcion* sets up a tension between federal authority, expressed as preemption, and state law of contracts, which is largely shaped by the common law judges of the states' appellate courts.<sup>2</sup> The question *Concepcion* presents for state courts is whether all provisions in consumer contracts that bar a consumer from being a class-action plaintiff and require arbitration are valid or whether a court may invalidate provisions on a case-by-case basis, particularly where they deprive the consumer of a remedy,<sup>3</sup> a matter of concern under the constitutions of many states.<sup>4</sup>

Section two of the FAA says that an arbitration provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>5</sup> *Concepcion* holds that the FAA preempts state contract-law concepts that would frustrate arbitration; it federalizes the principle of section two, at least to an extent.<sup>6</sup>

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1. 9 U.S.C. §§ 1–16 (2006).

2. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746–48, 1753 (2011).

3. *Id.* at 1744, 1746; see also *id.* at 1761 (Breyer, J., dissenting) (recognizing that in circumstances similar to the *Concepcions'* case, "non-class arbitration . . . will . . . sometimes have the effect of depriving claimants of their claims").

4. See, e.g., *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 538 (Ala. 2002) (holding the arbitration clause, which precluded class-action treatment of a dispute, was unconscionable and unenforceable because "[t]he public policy of Alabama as articulated by § 13 of the Constitution of Alabama of 1901 guarantees that 'every person, for any injury done to him, . . . shall have a remedy by due process of law'").

5. 9 U.S.C. § 2.

6. See *Concepcion*, 131 S. Ct. at 1753. I start with the proposition that Justice Scalia's opinion is law, despite the "reluctant" fifth vote from Justice Thomas, *id.* at 1754 (Thomas, J., concurring), which seems to have invented a new kind of separate opinion—the reluctant concurrence.

As is all too common with decisions of the Supreme Court of the United States, the reader must examine more than one opinion in a 5-4 decision to discern what is law. Justice Scalia's principal opinion, which is a majority opinion, should be read with Justice Thomas's concurring opinion in order to discern what propositions are wholly supported by a majority of the Court.<sup>7</sup> These propositions, at a minimum, are:

- 1) The FAA does not permit a state to find an arbitration agreement unconscionable solely because the agreement has a class action waiver;<sup>8</sup>
- 2) The FAA does not otherwise preempt traditional state law defenses to contract formation.<sup>9</sup>

While there remains a question of whether *Concepcion* leaves open a case-by-case determination of whether there are state-law precepts that invalidate company-friendly arbitration provisions,<sup>10</sup> the question ultimately may be more important for federal courts applying state law than for state courts because many class actions filed in state courts will be removed to federal court under the Class Action Fairness Act.<sup>11</sup>

A careful reading of *Concepcion* is in order for post-*Concepcion* cases, whether in state courts or in federal courts applying state contract law. The *Concepcion* plaintiffs sued AT&T Mobility alleging that they were improperly charged sales tax on the retail value of cell phones that they received for "free" upon the signing of their service contract.<sup>12</sup> The original suit in federal court was consolidated with a class action alleging that AT&T Mobility engaged in fraud and false advertising in charging sales tax on phones the company had

7. See *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006) (examining a Supreme Court plurality opinion and Justice Kennedy's concurrence to determine the rule that lower courts should follow); *Jacobsen v. U.S. Postal Serv.*, 993 F.2d 649, 655 n.2 (9th Cir. 1992) (counting votes to consider whether "the Supreme Court would have five votes for holding a post office is a nonpublic forum" and whether such a determination would apply to airports as well); Tristan C. Pelham-Webb, *Powelling for Precedent: "Binding" Concurrences*, 64 N.Y.U. ANN. SURV. AM. L. 693, 695–96, 698–99 (2009); James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 520 (2011).

8. *Concepcion*, 131 S. Ct. at 1748 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

9. *Id.* ("§ 2's saving clause preserves generally applicable contract defenses . . ."); *id.* at 1753 (Thomas, J., concurring) ("As I would read it, the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress.").

10. See *id.* at 1748 (plurality opinion) (making a narrow assertion that a state rule will be displaced if it "stand[s] as an obstacle to the accomplishment of the FAA's objectives").

11. See 28 U.S.C. §§ 1332(d)(2), 1453(b) (2006) (expanding federal courts' jurisdiction in class actions).

12. *Concepcion*, 131 S. Ct. at 1744.

advertised as free.<sup>13</sup> Despite the district court's conclusion that the arbitration remedy was "'quick, easy to use' and likely to 'promptly full or . . . even excess payment to the customer,'" the district court held the arbitration provision unconscionable under California law based on the California Supreme Court's decision in *Discover Bank v. Superior Court*.<sup>14</sup>

*Discover Bank* held that a class-action waiver in a consumer contract is unconscionable where consumer claims are small and the plaintiff alleges a scheme to cheat consumers.<sup>15</sup> The defect of *Discover Bank* is that it required courts to strike down arbitration provisions with class-action waivers without regard to whether the provision was otherwise unconscionable or, indeed, whether the consumer was worse off without arbitration.<sup>16</sup> The district court in *Concepcion* had concluded that individual arbitration would be more beneficial to a consumer than being a participant in a class action.<sup>17</sup> Under California's *Discover Bank* principle, class-action waivers are rarely enforced;<sup>18</sup> this prompted the Supreme Court's holding that the FAA preempts California law because *Discover Bank* "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"<sup>19</sup>

Justice Scalia's opinion, as reinforced by the fifth vote of Justice Thomas, acknowledges that section two of the FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."<sup>20</sup>

Justice Thomas's opinion is slightly narrower than Justice Scalia's majority, so the majority opinion should be read as being informed by the reasoning of the Thomas opinion. To do otherwise is to ignore the separately expressed views of one-fifth of the Court's majority. Justice Thomas focuses on the language of section two's saving clause that refers only to defenses that result in "revocation" of a contract<sup>21</sup>—not the broader language of Justice Scalia that refers also to "invalidation" or "nonenforcement" of a contract.<sup>22</sup>

13. *Id.*

14. *Id.* at 1745 (alteration in original); *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at \*9, \*11 (S.D. Cal. Aug. 11, 2008), *rev'd* AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2011).

15. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2011).

16. *See Concepcion*, 131 S. Ct. at 1746, 1750.

17. *Laster*, 2008 WL 5216255, at \*11–12; *see also Concepcion*, 131 S. Ct. at 1745 (citing *Laster*, 2008 WL 5216255, at \*11–12).

18. *See Concepcion*, 131 S. Ct. at 1746 (finding California's *Discover Bank* was "frequently applied . . . to find arbitration agreements unconscionable").

19. *Id.* at 1753 (citation omitted).

20. *Id.* at 1746 (quoting *Doctor's Assocs., Inc., v. Casarotto*, 517 U.S. 681, 687 (1996)).

21. *Id.* at 1754–55 (Thomas, J., concurring).

22. *Compare id.* at 1746 (plurality opinion), *with id.* at 1754 (Thomas, J., concurring).

The FAA, Justice Thomas says, requires “enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement . . . .”<sup>23</sup> By contrast, “[c]ontract defenses unrelated to the making of the agreement—such as public policy,” which was the basis for the *Discover Bank* principle, “could not be the basis for declining to enforce an arbitration clause.”<sup>24</sup>

In analyzing Justice Scalia and Justice Thomas’s opinions, the reader can discern that the FAA, as applied in *Concepcion*, requires an individualized examination of the arbitration provision at issue because a state-law defense is preempted only when the defense “stand[s] as an obstacle to the accomplishment of the FAA’s objectives.”<sup>25</sup> In each case, therefore, the court must review the terms and the circumstances of the formation of the contract to determine whether they render the provision invalid due to fraud, duress, unconscionability, or another defense to the formation of the contract.<sup>26</sup>

As an aside, I note that among some teachers of contract law, unconscionability is not particularly fashionable because it is a doctrine that is sometimes invoked to rescue the weak from the strong.<sup>27</sup> Contracts of adhesion are also dealt with derisively; for example, consider Justice Scalia’s observation that “the times in which consumer contracts were anything other than adhesive are long past.”<sup>28</sup> One might ask whether Justice Scalia is speaking as a common law judge, and if so, whose common law is he talking about? One possibility—not acknowledged by post-*Concepcion* courts or commentators—is that the *Concepcion* opinion is opening the way to displace state law entirely and making the “grounds as exist at law or in equity for the revocation of any contract”<sup>29</sup> a question of federal common law, in the way that federal labor law has preempted state employment law and caused courts to develop a federal common law on the subject.<sup>30</sup>

The Scalia opinion, however, seems to eschew that kind of sweeping change; in a footnote the opinion says, “Of course States remain free to take

23. *Concepcion*, 131 S. Ct. at 1755 (Thomas, J., concurring).

24. *Id.*

25. *Id.* at 1748 (plurality opinion).

26. *See id.* at 1746; *id.* at 1754–55 (Thomas, J., concurring).

27. *See, e.g.,* Susan A. FitzGibbon, *Teaching Unconscionability Through Agreements to Arbitrate Employment Claims*, 44 ST. LOUIS U. L.J. 1401, 1405–06 (2000) (describing unconscionability analysis as “an imprecise process” that takes into consideration the “disparity of bargaining power between the parties”).

28. *Concepcion*, 131 S. Ct. at 1750. Common law aside, Missouri’s Uniform Arbitration Act specifically precludes enforcement of contracts of adhesion. Mo. Rev. Stat. § 435.350 (2000); *see also* *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 857 (Mo. 2006) (“An arbitration clause in a contract of adhesion is not enforceable, pursuant to section 435.350.”).

29. *Concepcion*, 131 S. Ct. at 1746 (quoting 9 U.S.C. § 2 (2006)).

30. Timothy A. Kelley, *Labor Law Gap-Filling: Federal Common Law Ideals Versus Litigation Realities*, 72 OHIO ST. L.J. 437, 438 & n.5 (2011).

steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted.”<sup>31</sup> But, he adds, “[s]uch steps cannot . . . conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.”<sup>32</sup>

The doctrine of unconscionability is well anchored in state law, derided or not, and is summarized in section 208 of the Restatement (Second) of Contracts:

If a contract or term thereof is unconscionable *at the time the contract is made* a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.<sup>33</sup>

In assessing the question of unconscionability, a lynchpin, at least for some state judges, is whether it appears from the language of the contract that the provision would foreclose the consumer from any effective remedy or whether there would be a remedy available.<sup>34</sup> The role preserved for state courts interpreting state law is subject to the constitutional mandate that there be a remedy for every legal wrong, a mandate found in the constitutions of most states, but not in the United States Constitution.<sup>35</sup> Article one, section fourteen of the Missouri Constitution provides, for example, “[t]hat the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.”<sup>36</sup>

So the question for a state court is whether the arbitration provision, with the class-action waiver, denies the opportunity for a just resolution of a consumer dispute by foreclosing a remedy. Under *Concepcion*, this does not invite an inquiry as to whether the application of the contract denies a remedy as a practical matter; the focus is on the formation of the contract.<sup>37</sup>

31. *Concepcion*, 131 S. Ct. at 1750 n.6.

32. *Id.*

33. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (emphasis added).

34. See, e.g., *Leonard v. Terminix Int’l Co., L.P.*, 854 So. 2d 529, 538–39 (Ala. 2002).

35. ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW CASES AND MATERIALS 431 (4th ed. 2006); David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 n.25 (1992) (documenting the thirty-nine states that had a constitutional right-to-a-remedy clause as of 1992).

36. MO. CONST. art. I, § 14; see also *Kilmer v. Mun*, 17 S.W.3d 545, 546 (Mo. 2000) (finding that a statutory restriction requiring a liquor licensee’s conviction in order to maintain a civil dram shop action violated the “open courts” provision of the Missouri Constitution).

37. *Concepcion*, 131 S. Ct. at 1755 (Thomas, J., concurring). Missouri law is consistent with the description of unconscionability in a case cited by Justice Thomas in *Concepcion*, *id.* at 1755, *Hume v. United States*:

Missouri courts have evaluated unconscionability<sup>38</sup> on a case-by-case basis. If the arbitration agreement in the *Concepcion* case were evaluated in the Missouri courts, the agreement would not be determined to be unconscionable because, in view of the trial court's findings, it appears to provide a speedy remedy for the consumer disputes.<sup>39</sup> If the company pays for the arbitration, and, in the event the customer prevails and is awarded more than the defendant's last settlement offer, provides a minimum of \$7,500 and twice the attorney's fees incurred, there is a remedy. Those are the *Concepcion* facts, as the district court found them.<sup>40</sup>

Missouri's common law of unconscionability has two aspects: procedural unconscionability, which relates to the circumstances of the formation of the contract, and substantive unconscionability, which relates to the provisions of the contract itself.<sup>41</sup> "[U]nconscionability can be procedural, substantive[,] or a combination of both. There is no need in all cases to show both aspects of

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In his celebrated judgment in *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125, 155, Lord Hardwicke arranged all the forms of fraud, recognized by equity, in four classes, the first two of which he gives in these words

"1. Then fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case. 2. It may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains, and of such even the common law has taken notice, for which, if it would not look a little ludicrous, might be cited *James v. Morgan*, 1 Lev 111."

132 U.S. 406, 411 (1889). "And there may be contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception, or at least to require but slight additional evidence to justify such presumption." *Id.* at 414.

38. "Unconscionable" is "an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it." Mo. Dep't of Soc. Servs., Div. of Aging v. Brookside Nursing Ctr., Inc., 50 S.W.3d 273, 277 (Mo. 2001) (quoting *Peirick v. Peirick*, 641 S.W.2d 195, 197 (Mo. Ct. App. 1982)). An unconscionable contract has been defined as "an agreement 'such as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept on the other.'" *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003) (quoting *Hume*, 132 U.S. at 415).

39. See MO. CONST. art. I, § 14 (guaranteeing the right to a remedy without "delay"); *Concepcion*, 131 S. Ct. at 1753 (agreeing with the district court's assertion that the *Concepcions* were "better off" under the AT&T arbitration agreement since a class action "could take months, if not years"); see also *Swain*, 128 S.W.3d at 107 ("Because the bulk of contracts signed in this country are form contracts . . . any rule automatically invalidating adhesion contracts would be 'completely unworkable.' Rather, our courts seek to enforce the reasonable expectations of the parties. Only those provisions that fail to comport with those reasonable expectations and are unexpected and unconscionably unfair are unenforceable.") (internal citations omitted).

40. *Concepcion*, 131 S. Ct. at 1744.

41. State *ex rel.* Vincent v. Schneider, 194 S.W.3d 853, 858 (Mo. 2006).

unconscionability.”<sup>42</sup> Missouri cases will hold a contract to be substantively unconscionable where the provision is so one-sided that it holds one party immune from liability as a practical matter.<sup>43</sup>

There seems little doubt that, as described in Justice Scalia’s opinion and as found by the district court, the arbitration provision would not be substantively unconscionable because the consumer has not just a remedy, but an apparently better remedy than he or she would have in a class action.<sup>44</sup>

More significant than measuring the *Concepcion* provision under Missouri law is the larger point that Missouri law is not hostile to mandatory arbitration.<sup>45</sup> That has not always been the case; Missouri, like most states, initially was reluctant to enforce the FAA.<sup>46</sup> This reluctance led the Commissioners on Uniform State Laws to promulgate the Uniform Arbitration Act, which eventually was adopted in Missouri in 1980.<sup>47</sup>

Prior to the enactment of the Missouri arbitration statute, Missouri courts did not enforce arbitration provisions,<sup>48</sup> however, after the state law took

42. Ruhl v. Lee’s Summit Honda, 322 S.W.3d 136, 139 n.2 (Mo. 2010).

43. Manfredi v. Blue Cross & Blue Shield of Kan. City, 340 S.W.3d 126, 138 (Mo. Ct. App. 2011) (Ahuja, J., concurring). For cases supporting this point and summarizing Missouri cases on substantive unconscionability, see *id.* at 138 n.2 (citing Brewer v. Mo. Title Loans, Inc., 323 S.W.3d 18, 24 (Mo. 2010), *vacated*, 131 S. Ct. 2875 (2011); Ruhl v. Lee’s Summit Honda, 322 S.W.3d 136, 140 (Mo. 2010); Shaffer v. Royal Gate Dodge, Inc., 300 S.W.3d 556, 559–60 (Mo. Ct. App. 2009); Woods v. QC Fin. Servs., Inc., 280 S.W.3d 90, 98 (Mo. Ct. App. 2008); Whitney v. Alltel Commc’ns, Inc., 173 S.W.3d 300, 314 (Mo. Ct. App. 2005)).

44. *Concepcion*, 131 S. Ct. at 1753.

45. See, e.g., Greenwood v. Sherfield, 895 S.W.2d 169, 173–74 (Mo. Ct. App. 1995).

46. See Traci L. Jones, *State Law of Contract Formation in the Shadow of the Federal Arbitration Act*, 46 DUKE L.J. 651, 652, 656 (1996).

47. See G. William Quatman, *Missouri Arbitration Law Part I: The Uniform and Federal Arbitration Act*, 52 J. Mo. B. 78, 78 (1996). *Missouri Arbitration Law Part I: The Uniform and Federal Arbitration Acts* summarizes the history of the acts in Missouri:

Congress enacted the Federal Arbitration Act (“FAA”) in 1925 to change the common law rule, held in Missouri and other states, that an executory agreement to arbitrate, as distinguished from an agreement to submit a particular dispute to arbitration, was unenforceable. The FAA was intended to reverse centuries of hostility to arbitration agreements by placing arbitration agreements upon the same footing as other contracts.

Thirty years after passage of the FAA, states began to rewrite arbitration law along the lines of the federal model. To promote uniformity in enforcement and interpretation of arbitration agreements, the Uniform Arbitration Act was drafted in 1955. The Uniform Act has since been adopted by 34 states, including Missouri, which adopted it in 1980. The Missouri act applies to contracts made after August 13, 1980. Before Missouri’s adoption of the Uniform Act, arbitration clauses were not fully enforceable in this state. Since adoption of the Uniform Act, however, written agreements to arbitrate are valid and enforceable under both state and federal law.

*Id.* (footnotes omitted).

48. *Id.*



effect, Missouri law was held to encourage arbitration.<sup>49</sup> But when Missouri enacted the arbitration statute it put in requirements that are not in the federal law—a provision that excluded contracts of adhesion and a provision that required a contract to state, in ten-point capital letters, “THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.”<sup>50</sup>

However much the legislature may have wished to exclude adhesion contracts and to require notice to signers of contracts, the Supreme Court of Missouri held unequivocally in 1985 that, where the FAA applied, the federal law preempted the state statute’s requirements because the Act was one affecting interstate commerce.<sup>51</sup> “Any requirement of state law which adds a burden not imposed by Congress is in derogation of the Congressional power, and pro tanto invalid.”<sup>52</sup> The Missouri court’s holding is based on the United States Supreme Court decision in *Southland Corp. v. Keating*.<sup>53</sup> In *Allied-Bruce Terminix Cos. v. Dobson*, Justice Thomas, joined by Justice Scalia, dissented on the basis that “the Federal Arbitration Act . . . does not apply in state courts” and that the *Southland* decision should be overturned.<sup>54</sup> For his part, Justice Scalia in a separate dissent said he no longer dissented on the basis that *Southland* should be overturned, but if there were four justices prepared to do so, he would give them the fifth vote.<sup>55</sup>

This leads, perhaps a bit awkwardly, to discerning the meaning of Justice Thomas’s fifth vote in *Concepcion*, whose “reluctant” concurrence seems to have the effect of simultaneously endorsing the majority’s interpretation and limiting it. An extreme interpretation is that the 5–4 holding of *Concepcion*—that California’s *Discover Bank* rule stands as an obstacle to the purposes of the FAA and is thus preempted<sup>56</sup>—may be limited to cases that arise in federal courts, as *Concepcion* did.<sup>57</sup> Had the issue in *Concepcion* reached the United States Supreme Court from a state court, there may not have been five votes for preemption. In his dissent in *Allied-Bruce Terminix Cos. v. Dobson*, Justice Thomas insisted that the FAA in general, including section two of the

49. *Greenwood*, 895 S.W.2d at 173.

50. Compare MO. REV. STAT. §§ 435.350, 435.460 (2000), with 9 U.S.C. § 2 (2006).

51. *Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837, 839 (Mo. 1985).

52. *Id.*

53. *Id.* (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984) for the rule that a state statute cannot “bar an arbitration remedy under a contract which is within the coverage of the Federal Arbitration Act”).

54. 513 U.S. 265, 285–86, 295 (1995) (Thomas, J., dissenting).

55. *Id.* at 285 (Scalia, J., dissenting).

56. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

57. See *infra* notes 58–63 and accompanying text (describing Justice Thomas’s opinion, as expressed in several cases prior to *Concepcion*, that the FAA is applicable to federal courts only).

Act in particular, simply “does not apply in state courts.”<sup>58</sup> In *Allied-Bruce*, the Court held that the FAA preempted a state law “making written, predispute arbitration agreements invalid and ‘unenforceable.’”<sup>59</sup> Justice Thomas explained that “[a]t the time of the FAA’s passage in 1925, laws governing the enforceability of arbitration agreements were generally thought to deal purely with matters of procedure rather than substance,” and as such “[i]t would have been extraordinary for Congress to attempt to prescribe procedural rules for state courts.”<sup>60</sup> To the contrary, as the 1925 Congress understood matters, “state arbitration statutes prescribed rules for the state courts, and the FAA prescribed rules for the federal courts.”<sup>61</sup> In the view of Justice Thomas, this federal-court limitation on the FAA applies to section two because the text of the statute as a whole “makes clear that § 2 was not meant as a statement of substantive law binding on the States” but is instead “a purely procedural provision.”<sup>62</sup> Justice Thomas reiterated this view in four more cases after *Allied-Bruce*.<sup>63</sup>

The Court in *Concepcion* of course had no occasion to consider the extent to which its holding applied in state-court proceedings. When the Court makes a “judicial pronouncement,” that pronouncement’s value comes from “the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*.”<sup>64</sup> Put another way, the *Concepcion* decision may be understood as a pronouncement that extends only to the context of the particular case—a case litigated in federal court. Justice Scalia’s pronouncement that the “*Discover Bank* rule is preempted by the FAA”<sup>65</sup> perhaps should be interpreted to mean only that the *Discover Bank* rule is preempted by the FAA in federal court.

But, because Justice Thomas does not refer to his previous position that preemption does not apply to state courts,<sup>66</sup> he may simply have moved on from his earlier position, especially in light of the “Class Action Fairness Act

58. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 285–86 (Thomas, J., dissenting).

59. *Id.* at 269, 281–82 (majority opinion).

60. *Id.* at 286–88 (Thomas, J., dissenting).

61. *Id.* at 289.

62. *Id.* at 291.

63. *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting).

64. *Hewitt v. Helms*, 482 U.S. 755, 761 (1987).

65. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

66. *See id.* at 1753–56 (Thomas, J., concurring) (failing to argue that section two does not apply to state courts).

of 2005,”<sup>67</sup> in which Congress made many class actions removable from state to federal court.<sup>68</sup>

The Act’s “Findings and Purposes” show a clear intent to allow class-action defendants to opt out of state courts because, among other things, state and local courts “sometimes act[] in ways that demonstrate bias against out-of-State defendants . . . .”<sup>69</sup> The Act provides diversity of citizenship in “interstate cases of national importance,”<sup>70</sup> specifically a minimal kind of diversity jurisdiction:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.<sup>71</sup>

The jurisdictional provisions allow, or occasionally require, a district court to decline jurisdiction in a number of circumstances that indicate that the action was more local than national in its scope or applicable law.<sup>72</sup>

The purpose of the Class Action Fairness Act, as evident from the expressed congressional intent, is to allow most large consumer class actions to be removed to federal court.<sup>73</sup>

If Justice Thomas’s consistent position prevails, the FAA does not apply in state courts.<sup>74</sup> That presents an awkward situation, for the law would change with the change of forum.<sup>75</sup> For example, cases not removed from Missouri

67. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

68. 28 U.S.C. § 1453 (2006); Class Action Fairness Act of 2005 § 5(a).

69. Class Action Fairness Act of 2005 § 2(a)(4)(B).

70. *Id.* § 2(b)(2).

71. 28 U.S.C. § 1332(d)(2) (2006).

72. *Id.* § 1332(d)(3)–(4).

73. Class Action Fairness Act of 2005 § 2; *see also* Steven M. Puiszis, *Developing Trends with the Class Action Fairness Act of 2005*, 40 J. MARSHALL L. REV. 115, 130 (2006) (“CAFA was intended to expand federal jurisdiction over ‘large’ class actions . . .”).

74. *See supra* notes 57–63 and accompanying text.

75. *See* Kenneth F. Dunham, *Sailing Around Erie: The Emergence of a Federal General Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197, 206 n.68 (2006) (discussing *Berhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198 (1956), which applied *Erie* doctrine to the question of whether to compel arbitration and remanded to determine which state law to apply to the question). This would create a twist on *Erie Railroad Co. v. Tompkins*, which held that in federal

courts to federal courts would enforce Missouri's Uniform Arbitration Act provision, discussed above, which does not enforce arbitration clauses in contracts of adhesion and requires that contracts with arbitration provisions have a ten-point-type, all-capital-letter warning that arbitration may be required.<sup>76</sup> If such a case were removed to federal court under the Class Action Fairness Act, neither of those restrictions would apply.<sup>77</sup> The result may well be that litigants in the federal court would be compelled to arbitrate, and litigants in state court would not. That does not seem tidy, as equitable administration of law goes, but it may simply be a result of Congress's recognition that certain class actions—with minimal diversity and more than five million dollars in controversy<sup>78</sup>—can be considered of “national importance,”<sup>79</sup> while other actions, including those where the federal judge chooses to decline jurisdiction and remand to state court under 28 U.S.C. § 1332(d)(3), can be considered merely local in nature.<sup>80</sup> This division of class actions between those that are of “national importance” and those that are merely local does not account for actions where the defendants do not remove an otherwise removable case to federal court, either for strategic reasons or for simple neglect.

Although there may be differences as to the law applied in federal courts under the FAA and in state courts under state statutes such as the Uniform Arbitration Act, questions of contract defenses—as specified in section two of the FAA as “such grounds as exist at law or in equity for the revocation of any contract”<sup>81</sup>—ought to be uniform between federal and state courts because the courts in any given state are applying the same law. Well, that's the theory anyway.

Congress apparently was under such an impression when it passed the Class Action Fairness Act, in which the congressional findings refer specifically to “bias” in the state courts.<sup>82</sup> The “Findings and Purposes” section refers to fair treatment of consumers who are members of the class,<sup>83</sup>

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courts the law of the state governs unless the matter is governed by the Federal Constitution or by acts of Congress. 304 U.S. 64, 78 (1938).

76. MO. REV. STAT. §§ 435.350, 435.460 (2000).

77. See *Mitchell v. Career Educ. Corp.*, No. 4:11cv1581 TCM, 2011 WL 6009658, at \*2 & n.3 (E.D. Mo. Dec. 1, 2011).

78. 28 U.S.C. § 1332(d)(2) (2006).

79. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4)(A), 119 Stat. 4, 5 (codified in scattered sections of 28 U.S.C.).

80. See Jeffrey L. Roether, *Interpreting Congressional Silence: CAFA's Jurisdictional Burden of Proof in Post-Removal Remand Proceedings*, 75 *FORDHAM L. REV.* 2745, 2760 (2007).

81. 9 U.S.C. § 2 (2006).

82. Class Action Fairness Act of 2005 § 2(a)(4)(B).

83. *Id.* § 2(b)(1).

but it seems as likely that “fairness” in the Act’s title refers to the opportunity for class-action defendants to escape from state courts.

I end, as I started, with the question of whether *Concepcion* requires nearly all arbitration provisions to be enforced, or whether courts can take a case-by-case approach under a state’s contract laws relating to defenses to contract formation, including unconscionability.<sup>84</sup> Early indications are that state courts are reading *Concepcion* as allowing a case-by-case approach,<sup>85</sup> while it is less clear whether the federal courts are going to take a similar approach or apply a

84. When the Court decided *Concepcion*, it vacated and remanded six decisions in light of the decision. The following decisions on remand have not yet been reported: *Gordon v. Branch Banking & Trust*, 419 F. App’x 920, 924, 926 (11th Cir.) (holding a class-action waiver in a consumer contract was unconscionable where the consumer had limited viable options for relief), *vacated sub nom.*, *Branch Banking & Trust v. Gordon*, 132 S. Ct. 577 (2011); *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 141 (2d Cir. 2010) (finding agreement which prevented the plaintiff from pursuing his claims on a class-wide basis was unconscionable under California law), *vacated sub nom.*, *Affiliated Computer Servs., Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011); *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130, 146, 152 (Cal.) (finding the arbitration provisions were substantively unconscionable and not preempted by the FAA), *vacated*, 132 S. Ct. 496 (2011). The following decisions on remand have been reported: *Litman v. Cellco P’ship*, 381 F. App’x 140, 142–43 (3d Cir. 2010) (vacating the district court’s order compelling arbitration and remanding for a consideration of whether the class waiver here was unconscionable), *vacated sub nom.*, *Cellco P’ship v. Litman*, 131 S. Ct. 2872 (2011); *Brewer v. Mo. Title Loans*, 323 S.W.3d 18, 24 (Mo. 2010) (invalidating arbitration clause with a class-action waiver as unconscionable), *vacated sub nom.*, *Mo. Title Loans v. Brewer*, 131 S. Ct. 2875 (2011); *Herron v. Century BMW*, 693 S.E.2d 394, 399–400 (S.C. 2010) (finding the provision prohibiting auto buyers from bringing class actions unconscionable because it violated the state’s law and public policy protecting auto buyers’ rights to bring class suits), *vacated sub nom.*, *Sonic Auto., Inc. v. Watts*, 131 S. Ct. 2872 (2011). On remand, the Third Circuit rejected the “New Jersey law holding that waivers of class arbitration are unconscionable” and thus compelled arbitration in *Litman v. Cellco P’ship*, 655 F.3d 225, 232 (3d Cir. 2011). However, the Supreme Court of South Carolina reinstated its vacated opinion, concluding that the FAA preemption issues were not preserved. *Herron v. Century BMW*, 719 S.E.2d 640, 641 (S.C. 2011). Also, the Missouri Supreme Court held the entire arbitration provision unconscionable and unenforceable under Missouri law on remand. *Brewer v. Mo. Title Loans*, No. SC 90647, 2012 WL 716878, at \*10 (Mo. Mar. 6, 2012); *cf.*, *Robinson v. Title Lenders, Inc.*, No. SC 91728, 2012 WL 724669, at \*1 (Mo. Mar. 6, 2012) (reversing trial court’s invalidation of the arbitration agreement based on a class-action waiver and remanding to consider the unconscionability of the arbitration agreement on other grounds).

85. See Frank Blechschmidt, *All Alone in Arbitration: AT&T Mobility v. Concepcion and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541, 580–81 (2012) (describing how courts may distinguish *Concepcion* on its facts and citing a New Jersey appellate court that “recently invalidated a class action waiver that it found to be ‘too confusing, too vague, and too inconsistent to be enforced,’ despite its conclusion that *Concepcion* controlled”); see also *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 717 S.E.2d 909, 920 (W. Va. 2011) (“We believe that the circuit court was correct in finding that the arbitration provision was unconscionable . . . [but it] did err . . . by ruling that the existence of a class action waiver in an arbitration provision suggests the provision is *automatically* or *presumptively* unconscionable.”).

“broad and clear” understanding.<sup>86</sup> The federal courts have not concluded that applying a state’s unconscionability doctrine is *ipso facto* an obstacle to enforcement of the FAA.<sup>87</sup>

The Supreme Court’s decision in *Concepcion* may not have been entirely consistent with congressional purpose in passing the FAA in 1925,<sup>88</sup> but it certainly seems consistent with the spirit of the Class Action Fairness Act of 2005.<sup>89</sup> To state courts, this displacement of state law both in the Class Action Fairness Act and in *Concepcion* will seem to be more like usurpation than preemption.

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86. B. Rush Smith III & Sean R. Higgins, *AT&T Mobility LLC v. Concepcion: Time to Consider a Motion to Compel Arbitration?*, BUS. L. TODAY, Sept. 2011, at 1, 2–3 (noting that while the Third and Eleventh Circuits have adopted a “broad and clear” understanding of *Concepcion*, in which “a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration [will be held to be] inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration is desirable for unrelated reasons,” other courts, such as the one in *Checking Account Overdraft Litigation*, have adopted a “case-by-case analysis of the applicable state law doctrine of unconscionability” to find that an arbitration agreement is unenforceable).

87. *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) (citation omitted) (“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as . . . unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.”); *Kanbar v. O’Melveny & Myers*, No. C-11-0892 EMC, 2011 WL 2940690, at \*6–9 (N.D. Cal. July 21, 2011) (finding that *Concepcion* did not preempt the court’s finding of unconscionability under California state law).

88. *Compare Concepcion*, 131 S. Ct. at 1748 (alteration in original) (“The ‘principal purpose’ of the FAA is to ‘ensur[e] that private arbitration agreements are enforced according to their terms.’”), with *Quatman*, *supra* note 47, at 78, and notes 60–62 and accompanying text.

89. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (codified in scattered sections of 28 U.S.C.) (describing the congressional findings supporting the Act and outlining the purposes of the Act).

